IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 319 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KAMALNATH ISHRIPRASAD MALLA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MRS SHILPA R SHAH for Appellant(s) : 1,
Mr.R.C.Kodekar, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 03/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The present appellant – original accused Kamalnath Ishriprasad Malla has filed the present appeal against the judgment and order delivered by the Additional Sessions Judge, Surat in Sessions Case No.117 of 1993 on 27.3.1996 whereby the present appellant was convicted for the offence punishable under Section 302 of IPC for life imprisonment and imposed a fine of Rs.200/-, in default, to undergo 15 days SI. Learned Sessions Judge has not awarded the separate sentence though held guilty to the present appellant for the offence punishable under Sections 393, 397, 398 of IPC and Section 135 of the Bombay Police Act. Being aggrieved by the said judgment and order delivered by the learned Additional Sessions Judge, Surat, the appellant has preferred the present appeal.

2. As per the say of the prosecution, on 24.2.1993 at about 10.15 a.m., the complainant Purankumar Shrimitlal, a male servant of Rameshbhai Desai, resident of Narmadnagar, Athwalines, Surat along with the wife of his employer Charulataben were in the house and that other male members went at their business premises and the daughter-in-law of victim Charulataben i.e. Sejalben had gone to see her parents, the present appellant had knocked the door and the same had been opened by the complainant Purankumar; Kamalnath – appellant entered into the house and he demanded money from Charulataben for doing the painting work which he had done in the said

house; at that time, Charulataben had told the appellant that contract was given to one Gangaram and the appellant had done the above work on behalf of him so, if the appellant had to receive the money for the said painting work, then the appellant is required to take the same from Gangaram. In turn, the appellant told Charulataben that the appellant and others are waiting outside the house for 10 – 15 minutes till Gangaram arrives and thereafter the complainant and Charulataben both were in the house and victim was reading the newspaper. After 10 minutes, the appellant accused entered in the house along with two other persons and out of three, two others have caught hold Charulataben and the present appellant had taken out the knife from his pocket and it has been shown to the complainant and the appellant took the complainant into the room and demanded the key of the cup-board. In turn, the complainant replied that the key is with Charulataben. Meanwhile, Charulataben also tried to shout for help and, therefore, the appellant has given knife blows first into her chest and second into her abdomen. Along with the appellant, other two have also given knife blows and after seeing the same, the complainant tried to save himself and jump from the window of second floor and thereafter, he also shouted for help. As a result thereof, neighbour Jigishbhai came out from the bungalow. Meanwhile, all three persons, who entered into the house of the deceased, tried to run away; out of three, one ran towards the right, one towards the

left and one straight and Jigishbhai and complainant tried to chase the person who was running straight and ultimately, even others have also chased him. The appellant had been caught hold red-handed from the river bank of Tapi by the Police Constable and thereafter the appellant had been handed over to the Umra Police Station by the Police Constable. Out of three persons, the appellant was known to Charulataben as well as the complainant because before two months, he has painted the house of the victim as an employee of Gangaram. Meanwhile, Charulataben succumbed to the injuries.

3. The concerned police station had received telephonic information from somebody where it has been informed that somebody entered into the house for the purpose of dacoity and, therefore, the police had gone there and found that Charulataben was lying full of blood. Therefore, the police had immediately arranged to send her for treatment to the New Civil Hospital, Surat, where the doctor had declared her dead and, therefore, inquest panchanama was prepared at the Civil Hospital. Thereafter, the complainant had lodged the complaint with the Umra Police Station being CR No. I 302 of 1992 for the offence under Sections 393, 397, 398 and 302 of Indian Penal Code and Section 135 (1) of the Bombay Police Act.

4. The present appellant was arrested and arrest panchanama had been prepared in the presence of the panchas. The clothes, which the accused have

worn at the time of incident, had been seized along with the knife which is alleged to have been used by the appellant in the incident in question. The police had also made arrangement for preparing the panchanama of the scene of offence as well as inquest panchanama and also made arrangement to send the body of the deceased Charulataben for postmortem along with the note – yadi to that effect. On receiving the same, the postmortem had been carried out by the Doctor and on receiving the postmortem note, the same had been kept in the file. Meanwhile, the police also recorded the statement of neighbour Jigishbhai who had also chased the accused along with other witnesses and also sent muddammal to the FSL and on receiving the FSL report, the same had been kept along with the investigating papers. Meanwhile, another accused Durgaprasad had also been arrested after completing required formalities; he had also been sent to the judicial custody who had also inflicted blow.

5. At the end of investigation, the charge sheet was submitted before the Court against the present appellant and one Durgaprasad and one Vijayprasad Sadhunath has been shown as absconding.

6. As the case against the appellant and other accused was exclusively triable by the learned Sessions Judge, learned JMFC, 1st Court, Surat had committed the case in the Court of Sessions and the same has been numbered as Sessions Case No.117 of

1993 and it has been transferred to the Court of Additional Sessions Judge, Surat.

7. When the matter had come up for hearing before the Sessions Court on 27.1.1995, the accused Durgaprasad was released on bail and, as he was not available for trial, upon the request made by the appellant by way of the application dated 27.1.1995, the trial of the present appellant had been separated and proceeded qua the present appellant only. For that, charge had been framed against the appellant on 7.7.1995 at Exh.6. As the accused appellant has pleaded not guilty and prayed for trial, to prove the guilt against the accused- appellant, the prosecution had examined in all 13 witnesses as oral witnesses.

P.W.1 – Anilkumar Sumanbhai Desai, Exh.10, Panch of discovery panchanama wherein the appellant accused has shown willingness to produce muddammal knife.

P.W.2 – Babubhai Dalpatram, Exh.11, panch of seizure of clothes of the appellant – accused.

P.W.3 – Kishor Ishwarlal Jariwala, Exh.13, panch of search and seizure of the house of the appellant – accused.

P.W.4 – Snehal Sureshchandra Shah, Exh.15,

second panch of search and seizure of the house of the appellant – accused.

P.W.5 – Maheshbhai Vallabhbhai Sanderiya, Exh.16, panch of the panchanama of scene of offence.

P.W.6 – Chetanbhai Bipinbhai, Exh.18, panch of panchanama of the scene of offence.

P.W.7 – Purankumar Shrimitlal Mohru, Exh.23, complainant and a male servant of the deceased who had also received injuries in the incident in question.

P.W.8 – Jigishbhai Shankarlal Raval, Exh.25, a person who chased the appellant – accused and ultimately the accused was caught hold by P.W.9.

P.W.9 – Ramjanak Ramprabhu Yadav, Exh.26, Police Constable who had also chased the appellant – accused and caught hold and produced before Umra Police Station.

P.W.10- Dr.Bhataram Vishweshwar Subramanyam, Exh.28, Doctor who had performed post-mortem of the deceased Charulataben.

P.W.11- Nisar Ahmed Shaikh, Exh.32, Second panch of discovery panchanama of knife.

P.W.12- Dilipbhai Arjunbhai Rathod, Exh.34, Investigating Officer.

P.W.13- Dr.Smitaben Jayantilal Nagarvadiya, Exh.35, Doctor who had treated the complainant Purankumar and also issued the certificate Exh.36.

8. We have heard the learned counsel for the appellant Ms.Shilpa Shah and on behalf of the State, learned APP Mr.R.C.Kodekar.

9. Mainly, it has been argued by Ms.Shah that there are three witnesses upon which the prosecution has placed reliance. Arguing the same, she took us to the oral evidence of P.W.7 Exh.23 who is the complainant and who was working as a male servant at the house of the victim Charulataben and at the time of incident, he was present in the house along with Charulataben and is the witness of the incident and the person who jumped from the window and shouted for help and that he had also chased the accused along with Jigishbhai. Ultimately, the appellant – accused had been arrested and produced before the police. P.W.7 also received injury in the incident and it has been proved through P.W.13 Dr.Smitaben Jayantilal before whom he has been sent for treatment with police yadi and through whom the prosecution has proved the complaint Exh.24. During the course of the evidence of P.W.7, he had also narrated the incident

in detail along with the clothes with colour which were alleged to have been worn by the appellant accused and the same have been identified before the Court along with the muddammal knife.

9.1 Simultaneously, Ms.Shah also took us to the oral evidence of another prime witness Jigishbhai Raval P.W.8 – Exh.25 and it has been argued by her that there is contradiction in the evidence of P.W.7 complainant - Purankumar as well as Jigishbhai Raval P.W.8. She further argued that therefore, the Court below should not have put the reliance upon the above evidence. She submitted that Jigishbhai Raval came in the picture after the complainant – Purankumar jumped from the window and shouted for help and, thereafter, Jigishbhai Raval had also chased the appellant – accused along with Purankumar, but according to her he is not the witness of incident.

9.2 She also took us to the evidence of the witness P.W. 9 – Exh.26 Ramjanak Ramprabhu Yadav who was serving at the Surat City Police Station as Police Constable, who was just standing at the City bus stop and waiting for the bus; at that time, as Jigishbhai Raval and other were chasing the appellant – accused, he also started chasing and ultimately he caught hold of the appellant and produced before the police. He took him to Umra Police Station and handed over him to the concerned Police Officer.

9.3 She has also argued that Pavankumar is not

the witness of the incident for which she has argued that at the time of incident he has been taken into the room by the appellant – accused and, therefore, it cannot be said that he is the witness of the incident.

9.4 She has also took us to the evidence of the Investigating Officer and argued that in any case of the matter, it was not the intention of the accused to kill deceased Charulataben and therefore, there cannot be said to be an offence punishable under Section 302 of Indian Penal Code, but at the most, it can be said to be an offence punishable under Section 304 Part I of IPC.

10. On the other hand, Mr.Kodekar, learned APP has also placed reliance upon the above referred three witnesses along with the documentary evidence that is complainant - Purankumar PW 7, Jigishbhai Raval PW 8 and Ramjanak Yadav, Police Constable PW 9 and has also placed reliance upon the complaint, FSL report, discovery panchanama, muddammal article knife, clothes of the accused, P.M.Note and oral evidence of the Doctor who has performed the post-mortem. He also took us through the evidence to that effect and submitted that human blood stains have been found from the clothes and knife which was alleged to have been recovered from the accused.

10.1 It has been argued by him that the incident in question has taken place in broad day light at the

house of the victim and the appellant – accused was known to the complainant and Charulataben as he had worked as painter at the house of the deceased before few days of the incident and before the incident took place, there was talk between the appellant and the victim regarding the payment in the presence of the complainant. He argued that the incident has taken place in the presence of the complainant and there is an evidence to that effect. Not only that, after the incident, the appellant and other accused have left the house and they tried to run away from the scene of incident and that they have been chased by the present complainant and Jigishbhai Raval and ultimately, the appellant has been arrested on the spot and, therefore, it cannot be said that the complainant is not eye-witness and appellant has been falsely involved in the crime in question.

10.2 Over and above, Mr.Kodekar has also took us to the scientific evidence and argued that it is a serious case in nature, where the appellant and others have entered into the house with ulterior motive of dacoity and ultimately dacoity resulted in murder. It has been argued by him that there is no major contradiction in the evidence of the witnesses and this cannot fall under Section 304(1) of IPC, and therefore, it is requested to dismiss the appeal.

11. We have gone through the oral as well as documentary evidence and also the reasoned judgment delivered by the Court below. The important facts

which emerge from the above referred evidence are that the complainant, victim Charulataben and the appellant were known to one another because the appellant had worked at the house of the victim as a man of the Contractor Gangaram for the purpose of painting of the house. The incident in question had taken place in a broad day light. There were exchange of words regarding demand of money from the victim and the reply has been given by her that the contract of painting was given to Gangaram and, therefore, the appellant and other have waited outside the flat and again entered into the house.

12. It is also established from the evidence of the complainant PW 7 Exh.23 and his complaint at Exh.24 which has been given at the earliest after incident wherein also the complainant has narrated regarding the incident as well as the role played by the appellant and other accused, wherein he has come out with a case that the present appellant had given knife blows upon the vital part of the body of the deceased that is chest, stomach etc. The complainant had further stated that along with the appellant, absconding accused had also given knife blow on the deceased and even the prosecution also gets support from the P.M.Note as well as from the inquest panchanama and also from the evidence of the Doctor who had performed the postmortem. So, the complainant gets support from the above referred evidence.

13. We have also carefully considered the

evidence of the complainant which is trustworthy and that he had specifically deposed that first the appellant – accused had tried to obtain the key of the cupboard which was lying in the room but he could not open it and, therefore, again he took the complainant along with him and the appellant had demanded the key from Charulataben where Charulataben had shouted for help and therefore, knife blows had been given by the appellant as well as accused Durgaprasad upon the deceased and, therefore, the argument advanced by the learned counsel for the appellant that the complainant is not the witness of the incident is not required to be accepted. Over and above, we have also taken into consideration the evidence of Jigishbhai Raval, PW 8 as well as oral evidence of the Police Constable, PW 9. The above referred witnesses are also important witnesses and their evidences are required to be taken into consideration because Jigishbhai Raval is a person who met at the earliest to the complainant who has narrated the incident. Not only that, Jigishbhai Raval and complainant both have tried to chase the appellant and during that process, PW 9 Police Constable Ramjanak Yadav was standing on the City Bus Stand who had also chased the appellant and ultimately, caught hold. We have carefully gone through the above referred evidences which are trustworthy. The Police Constable – PW 9 has caught hold the appellant and has handed over him in the same condition to the concerned Police Station. So, one can safely say that the appellant has been

arrested on the spot. Therefore, it cannot be said that the appellant has been falsely involved in the crime in question. Not only that, human blood stains were found on the clothes which have been seized from the body of the appellant and the prosecution gets support from the FSL report. Over and above, the muddammal knife which had been produced was also having human blood stains and had been proved by the FSL expert. Muddammal knife and the clothes have been identified by all three witnesses i.e., complainant, Jigishbhai Raval and Police Constable P.W.9. All the three witnesses have categorically deposed that at the time of incident, the clothes which have been worn by the accused along with the colour of the clothes and they have identified the said muddammal along with the appellant accused in the Court.

14. Over and above, it is also required to be taken into consideration that this is not a case which falls under Section 304(1) of IPC as argued by the learned counsel for the appellant, because it was well designed and well planned act which had been put into motion. The appellant along with two other accused went at the flat of the victim, knocked the door and the appellant alone entered into the house of the victim under the pretext he did not get the money of the work done by him. It was only a part of design and later on, all three have entered into the house along with deadly weapons in their custody. First, they have controlled the complainant and also caught hold the victim. As the victim is not giving

co-operation, they have tried to break open the lock of the cup-board. Meanwhile, the victim has tried to shout for help. The knife blows have been given by the appellant accused which resulted into the offence punishable under Section 302 of IPC. Therefore, it cannot be said that their intention was not to kill the victim.

15. Considering the facts and circumstances of the case, we are of the opinion that the prosecution is able to prove the guilt of the appellant – accused.

16. In the result, this appeal fails and the same is dismissed.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

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